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Federal Communications Commission  
Office of Secretary

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
)  
Implementation of the )  
Telecommunications Act of 1996: )  
)  
Telemessaging, )  
Electronic Publishing, and )  
Alarm Monitoring Services )

CC Docket No. 96-152

**COMMENTS OF SBC COMMUNICATIONS, INC.**

SBC Communications, Inc. ("SBC"), by its attorneys, files these comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") regarding certain interpretive issues involving Section 274 of the Telecommunications Act of 1996 ("Act").<sup>1</sup> These issues have to do with the circumstances under which a Bell Operating Company ("BOC") may have sufficient "control of or financial interest in" the content of information, such that the dissemination of the information should be regarded as "electronic publishing" as defined by Section 274(h), and with the proper interpretation of the terms "transaction," "filed with the Commission," and "made publicly available" under Section 274(b)(3).

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), to be codified at, 47 U.S.C. Sections 151 et seq. Citations herein will be to the Sections of the Act as it will be codified.

## I. SUMMARY

So as to avoid potential conflict with the fifteen express exceptions to the definition of electronic publishing under Section 274(h)(2), the Commission should not now adopt specific control/financial interest criteria. Rather, the Commission should conclude that future determinations regarding specific types of content should be conducted on a case-by-case basis.

Even if the Commission does otherwise, it should be careful not to stray from Congress' intention to apply Section 274 requirements only to the ability to generate or alter the content of information. Thus, any interpretation of what constitutes "control" should be limited to applying a two-part test: First, does the BOC have the power or authority to manage or direct the content of information? Second, does the BOC's power or authority over the content rise to such a level as to attribute the generation or alteration of the content to the BOC? Only if both questions can be answered in the affirmative should Section 274 requirements apply. Further, the Commission should conclude that the BOC has no "financial interest" in any communications in which it has no intellectual property rights with respect to the content of the communications.

For purposes of Section 274(b)(3), a "transaction" should be regarded as having occurred where an agreement has been made by which the BOC will provide to its Section 274 affiliate network access and interconnections. Where a BOC provides unbundled elements and facilities to a Section 274 which is also a certificated local exchange service provider, such an agreement also should be regarded as a transaction. However, such provisioning need not necessarily proceed by tariff alone (as might be applicable to network access under Section 274(d)), but may proceed by the same vehicle(s) allowed other similarly-certificated electronic publishers.

Finally, the Commission should conclude that the "filed with the Commission" and "publicly available" requirements would be satisfied if a BOC retained copies of contracts and

tariffs at its headquarters and in at least one location in each state where it does business, such that the information would be readily accessible to the Commission's Staff and members of the public.

## II. DISCUSSION

### A. Specific Control/Financial Interest Criteria Should Not Now Be Established.

In both the Section 272 Order and the Section 274 Order, the Commission concluded that a "highly fact-specific analysis" performed on a "case-by-case basis" should determine how to classify a particular service that does not fit cleanly within either the definition of electronic publishing stated in Section 274(h)(1) or the exceptions stated in Section 274(h)(2).<sup>2</sup> This approach should be adopted in the present context. Thus, the Commission should not establish a specific list of control/financial interest criteria to determine when a BOC may have a sufficient financial interest in or control of information content to support the application of Section 274 to the information.

The Commission must be wary of adopting any criteria that would result in applying Section 274 to any activity that Congress has specifically excepted from the definition of electronic publishing. For example, the Commission already has observed that Section 274(h)(2)(B) excepts "[t]he transmission of information as a common carrier," and has thus held that a BOC is not subject to Section 274 requirements where it merely provides the transmission

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<sup>2</sup> Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act, as amended, CC Docket No. 96-149, First Report and Order, FCC 96-489, released December 24, 1996 ("Section 272 Order"), para. 140; Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, CC Docket No. 96-152 ("Section 274 Proceedings"), First Report and Order, FCC 97-35, released February 7, 1996 ("Section 274 Order"), para. 40.

component of an electronic publishing service offered by unaffiliated entities.<sup>3</sup> Paragraph (h) lists fourteen more such exceptions (subparagraphs (A), and (C) through (O)). None of these exceptions should be eliminated or even diluted by an ill-considered or overly expansive view of control/financial interest, particularly given that such a test is not even reflected in the words of the statute.

Furthermore, future interpretations of any particular statutory exception should not be impacted by financial interest/control criteria established now and without the benefit of specific facts. Importantly, the Section 274 Order did not discuss most of the statutory exceptions of Section 274(h)(2), much less analyze them in any significant detail. The Commission must exercise care to not “chill” reasonable interpretations of these exceptions. Moreover, the Commission specifically referenced the separately-stated exception generally applicable to “network service of a type that is like or similar to these network services,” Section 274(h)(2)(M), in declining to adopt a specific test for determining when an ambiguous service might qualify as an electronic publishing service. The Commission should recognize that this additional exception, which is an “overlay” onto other exceptions to which it could refer, would make even more hazardous the formulation of specific financial interest/control criteria.

**B. Any Interpretation of the Term “Control” Should Be Consistent With Other Provisions of the Act Which Limit BOC Participation Only Where the Activity Involves “Generation or Alteration of the Content of Information.”**

If the Commission concludes that it now must interpret the term “control,” then in view of Congress’ repeated expressions of concern over the “generation” or “alteration” of content by a BOC, a two-part “control” test should apply: First, does the BOC have the power or authority to manage or direct the content of information? Second, does the BOC’s power or authority over

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<sup>3</sup> Section 274 Order, para. 49.

the content rise to such a level as to attribute the generation or alteration of the content to the BOC?

The first part of the test would depend primarily on the contractual relationship between the creator of the information and the BOC, and would turn on the BOC's ability to direct or manage the information content. In this context, the relationship between the content provider and the BOC can be structured so as to preserve to the content provider the exclusive right to create the information. However, there may be situations where the BOC would want to do more than merely act as a conduit to pass the content provider's information directly to the consumer.

In such instances, a finding of "control" should turn on whether the BOC has generated the content, or has the ability to alter the content in a manner which would change the substance or meaning of the information. This view of "control" is consistent with Congress' express intent found in the exceptions to the definition of electronic publishing. In specifying these exceptions, Congress repeatedly distinguished activities involving the "generation or alteration of the content of information:"

- 274(h)(2)(C): "The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information . . ."
- 274(h)(2)(E): "Data processing or transaction processing services that do not involve the generation or alteration of the content of information."
- 274(h)(2)(M): "Any other network service of a type is like or similar to these network services and that does not involve the generation or alteration of the content of information."
- 274(h)(2)(N): "Any upgrades to these network services that does not involve the generation or alteration of the content of information."

These provisions clearly indicate Congress' intent. If the BOC lacks the power to generate or alter the content, it cannot be said to control the content.

In applying the second part of the two-part test, generation/alteration can be distinguished from other activities which do not alter the substance or meaning of the communication. The electronic publishing business, as with its printed counterpart, is a functional "continuum" in which the electronic communication "end product" presented to the ultimate consumer results from several discrete functions beginning with generation and ending with presentation. This continuum may be depicted as follows:

Generation/Alteration		Introductory/Navigational/Gateway			
Author	> Edit	Compile	> Abstract	> Format	> Placement
Generation	Alteration	Assembly		Presentation	

Whether the BOC exercises control over the content of the electronic communication (i.e., the information) turns on which of the functions it has the ability to control. Only the ability to control the authorship or to edit the content of information constitutes "control." The same cannot be said regarding the remaining four functions:

**Compile:** The function of assembling information for ease of access. While it may involve compiling information drawn from multiple sources into a single communication, as long as the substance of the information is unchanged, the information has not been altered. This is a gateway function.

**Abstract:** The function of summarizing information. As long as the abstract is created merely as an introduction to the full text of the communication it is introductory information intended to provide navigational assistance.

**Format:** The function of presentation of information. This includes choosing the mode of communication and the media, as well as the language and protocol used in transmission. This function is permissible in that it does not affect the content of the information communicated in any way.

**Placement:** This function involves the means of access to the information, and includes the time, place and manner in which the information may be retrieved. This is a gateway function.

Under the two-part test, “control” should not be interpreted to include the ability of a BOC, when acting as a gateway provider, to limit the types of information to which its gateway connects.<sup>4</sup> Assuming the content would be available to the consumer even if not made available via the BOC’s gateway, it could not be said that the BOC has the ability to direct or manage the information content. The content provider would remain free to include any content in its communications, without any direction whatsoever from the BOC.<sup>5</sup> Since the BOC would not have acted in the role of author or editor, nor directed the author in what content should be included, it could not be said to have controlled the content of the communication.

**C. Any Interpretation of “Financial Interest” Should Require That the BOC Must Have a Legally Protected Intellectual Property Interest in the Content of the Information.**

The Commission should conclude that the BOC has no financial interest in any communications in which it has no intellectual property rights with respect to to the content of the communications.<sup>6</sup> The fact that the BOC may provide transport, or may engage in a fee-for-access transaction as an intermediary between the consumer and the content provider, does not confer on the BOC a legally protected ownership interest in the content of the communication. To the extent that the the BOC may provide a gateway service pursuant to Section 274(h)(2)(C)

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<sup>4</sup> FNPRM, para. 243.

<sup>5</sup> Assuming, *arguendo*, that the Commission were to conclude that the exclusion from the gateway were some form of an exercise of control, still the BOC’s choice to include or exclude a particular content provider from its gateway would merely represent a “placement” function.

<sup>6</sup> Section 274 proceedings, Comments of Pacific Telesis Group filed September 4, 1996 at 7; Comments of NYNEX filed September 6, 1996, at 6.

and receives fees for the gateway arrangement, or provide transaction processing pursuant to Section 274(h)(2)(E) and is compensated for the transaction, the BOC would have no cognizable financial interest in the content of the communication.<sup>7</sup>

**D. Section 274(b)(3) Requirements**

**“Transaction”** - Section 274(d) details the duty of a BOC under common ownership or control with a Section 274 affiliate to provide “network access and interconnections for basic telephone service” to electronic publishers. Only when a BOC and its Section 274 affiliate have agreed upon the terms and conditions for such network access and interconnections for its Section 274 affiliate should the agreement be regarded as a “transaction” within Section 274(b)(3). Similarly, an agreement between a BOC and its Section 274 affiliate for the provision of unbundled elements and facilities pursuant to stated terms and conditions would constitute a transaction.<sup>8</sup> This is consistent with the Commission’s determination in CC Docket No. 96-150 regarding the Act’s accounting safeguards.<sup>9</sup> Nothing in the Act suggests that a different meaning is necessary or would be appropriate.

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<sup>7</sup> Further, the BOCs have provided transport, billing and collection services in connection with enhanced services for many years. Although enhanced service providers compensate the BOCs for providing them these functions, it has never been suggested that the BOCs have thereby acquired have a financial interest in the content of the information or communication conveyed to the enhanced service consumer.

<sup>8</sup> FNPRM, para. 251. However, that is not to say that unbundled elements and facilities provided to an electronic publisher in its capacity as a certificated local exchange service provider must be the subject of a tariff. Section 274(d) does not require tariffs in such cases and should be reasonably read only as applicable to the provision of unbundled elements and facilities to an electronic publishers. A Section 274 affiliate holding such a local exchange service certificate should be able to obtain unbundled elements and facilities to the same extent and under the same conditions as other similarly certificated electronic publishers, whether via tariffs or otherwise.

<sup>9</sup> Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, FCC 96-490, released December 24, 1996 (“Accounting Safeguards Order”), para. 124.



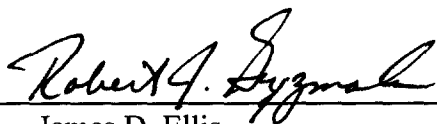
**“Filed with the Commission/Publicly Available”** - The BOCs should not be required under Section 274(b)(3)(B) to file their written contracts and tariffs on Commission premises.<sup>10</sup> Rather, BOCs should be permitted to retain copies of such contracts or tariffs on their premises such that they are accessible both to Commission Staff and members of the public upon reasonable request. This interpretation would be consistent with Commission Rule 43.51(c),<sup>11</sup> which spares the Commission from incurring the substantial expenses associated with receiving, processing, administering and storing documents filed at its premises. In this connection, it would be sufficient that the information be made available at the BOC’s corporate headquarters<sup>12</sup> and in at least one location in each state in which the BOC does business.

### III. CONCLUSION

SBC appreciates the opportunity to have provided its views regarding an appropriate approach for the interpretive issues presented by the Commission, and requests that the Commission rule in accordance with them.

Respectfully submitted,

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<sup>10</sup> FNPRM, para. 248.

<sup>11</sup> 47 C.F.R. Section 43.51(c).

<sup>12</sup> FNPRM, para. 250.

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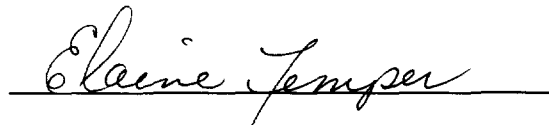
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April 4, 1997

**Certificate of Service**

I, Elaine Temper, hereby certify that Southwestern Bell Telephone Company's Comments to CC Docket No. 96-152 has been served this 4th day of April, 1997 to the Parties of Record.

A handwritten signature in cursive script, reading "Elaine Temper", is written over a horizontal line.

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